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REICHARD, L

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EXAMINER

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ART UNIT	PAPER NUMBER
3302	4

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**Please find below and/or attached an Office communication concerning this application or proceeding.**

**Commissioner of Patents and Trademarks**

## Office Action Summary

Application No. 08/593,796 Applicant(s) *Watterson*  
*Wenzer et al.*

Examiner Lynne A. Reichard Group Art Unit 3302



Responsive to communication(s) filed on May 23, 1996

This action is FINAL.

Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11; 453 O.G. 213.

A shortened statutory period for response to this action is set to expire 3 month(s), or thirty days, whichever is longer, from the mailing date of this communication. Failure to respond within the period for response will cause the application to become abandoned. (35 U.S.C. § 133). Extensions of time may be obtained under the provisions of 37 CFR 1.136(a).

### Disposition of Claims

Claim(s) 1-20 is/are pending in the application.

Of the above, claim(s) \_\_\_\_\_ is/are withdrawn from consideration.

Claim(s) \_\_\_\_\_ is/are allowed.

Claim(s) 1-20 is/are rejected.

Claim(s) \_\_\_\_\_ is/are objected to.

Claims \_\_\_\_\_ are subject to restriction or election requirement.

### Application Papers

See the attached Notice of Draftsperson's Patent Drawing Review, PTO-948.

The drawing(s) filed on \_\_\_\_\_ is/are objected to by the Examiner.

The proposed drawing correction, filed on \_\_\_\_\_ is  approved  disapproved.

The specification is objected to by the Examiner.

The oath or declaration is objected to by the Examiner.

### Priority under 35 U.S.C. § 119

Acknowledgement is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d).

All  Some\*  None of the CERTIFIED copies of the priority documents have been received.

received in Application No. (Series Code/Serial Number) \_\_\_\_\_.

received in this national stage application from the International Bureau (PCT Rule 17.2(a)).

\*Certified copies not received: \_\_\_\_\_

Acknowledgement is made of a claim for domestic priority under 35 U.S.C. § 119(e).

### Attachment(s)

Notice of References Cited, PTO-892

Information Disclosure Statement(s), PTO-1449, Paper No(s). 3

Interview Summary, PTO-413

Notice of Draftsperson's Patent Drawing Review, PTO-948

Notice of Informal Patent Application, PTO-152

--- SEE OFFICE ACTION ON THE FOLLOWING PAGES ---

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Upon further consideration of the instant application, the Examiner has determined that the claims are not directed to patentably distinct species of the claimed invention. Accordingly, the Requirement for Election of Species set forth in Paper No. 2 is hereby withdrawn. All claims are pending and examined on the merits below.

**Non-Statutory Provisional Double Patenting**

The non-statutory double patenting rejection, whether of the obviousness-type or non-obviousness-type, is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent. *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); and *In re Goodman*, 29 USPQ2d 2010 (Fed. Cir. 1993).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(b) and (c) may be used to overcome an actual or provisional rejection based on a non-statutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.78(d).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

Claim 1 is provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claim 1 of copending application Serial No. 08/593,794. Although the conflicting claims are not identical, they are not patentably distinct from each other because the only substantial difference between the claims is that claim 1 of U.S. Patent No. 08/593,794 includes handles which are conventional in the art and the instant application does not. Accordingly,

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modification of the instant application to include handles would have been obvious to one of ordinary skill in the art.

Claim 1 is provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claim 1 of copending application Serial No. 08/593,795. Although the conflicting claims are not identical, they are not patentably distinct from each other because the only substantial difference between the claims is that claim 1 of U.S. Patent No. 08/593,795 includes a cover which is conventional in the art and the instant application does not. Accordingly, modification of the instant application to include a cover would have been obvious to one of ordinary skill in the art.

Claim 1 is provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claim 1 of copending application Serial No. 08/593,797. Although the conflicting claims are not identical, they are not patentably distinct from each other because the support structure of claim 1 of the instant application reads on the freestanding housing of claim 1 of U.S. Patent Application Serial No. 08/593,797.

Claim 1 is provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claim 1 of copending application Serial No. 08/593,798. Although the conflicting claims are not identical,

they are not patentably distinct from each other because the only substantial difference between the claims is that claim 1 of U.S. Patent No. 08/593,798 includes an inclination mechanism which is conventional in the art and the instant application does not. Accordingly, modification of the instant application to include an inclination mechanism would have been obvious to one of ordinary skill in the art.

Claim 1 is provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claim 1 of copending application Serial No. 08/593,800. Although the conflicting claims are not identical, they are not patentably distinct from each other because the support structure of claim 1 of the instant application reads on the freestanding housing of claim 1 of U.S. Patent Application Serial No. 08/593,800.

Claim 1 is provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claim 1 of copending application Serial No. 08/593,862. Although the conflicting claims are not identical, they are not patentably distinct from each other because the only substantial difference between the claims is that claim 1 of U.S. Patent No. 08/593,862 includes an inclination mechanism which is conventional in the art and the instant application does not. Accordingly, modification of the instant application to include

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an inclination mechanism would have been obvious to one of ordinary skill in the art.

Claim 1 is provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claim 1 of copending application Serial No. 08/594,271. Although the conflicting claims are not identical, they are not patentably distinct from each other because the only substantial difference between the claims is that claim 1 of U.S. Patent No. 08/594,271 includes rollers for portability which are conventional in the art and the instant application does not. Accordingly, modification of the instant application to include rollers would have been obvious to one of ordinary skill in the art.

Claims 1-20 are rejected under the judicially created doctrine of double patenting over the claims of copending application numbers 08/593,793, 08/593,795, 08/593,798, 08/593802, and 08/594,271.

The subject matter claimed in the instant application is fully disclosed in the referenced copending applications and would be covered by any patent granted on that copending application since the referenced copending application and the instant application are claiming common subject matter, as follows:

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All of these applications claim the common subject matter of a treadmill having a support structure, a tread base having right and left sides and an endless belt, which is capable of being moved between a first operation position and a second storage position.

Furthermore, there is no apparent reason why applicant would be prevented from presenting claims corresponding to those of the instant application in the other copending applications. *In re Schneller*, 397 F.2d 350, 158 USPQ 210 (CCPA 1968). See also MPEP § 804.

**Rejections Under 35 U.S.C. § 112, second paragraph**

Claims 4-14 and 16-20 are rejected under 35 U.S.C. § 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

With regard to claim 4, claim for recites that the center of gravity of the tread base is above the base axis; however, the center of gravity of the tread base is only above the base axis when the tread base is in the second position. Claims 5-14 depend from claim 4 and likewise are indefinite.

With regard to claim 10, the right elongate member cannot be spaced from itself as claimed. For purposes of examining the instant application the Examiner has assumed that the right

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elongate member is spaced from the left elongate member. Claims 11-14 depend from claim 10 and likewise are indefinite.

With regard to claim 16, it is unclear whether the tread base or the user is required to be in the first position thus rendering the claim indefinite. Claims 17-20 depend from claim 16 and likewise are indefinite.

#### **Rejections Under 35 U.S.C. § 103**

The following is a quotation of 35 U.S.C. § 103 which forms the basis for all obviousness rejections set forth in this Office action:

A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Subject matter developed by another person, which qualifies as prior art only under subsection (f) or (g) of section 102 of this title, shall not preclude patentability under this section where the subject matter and the claimed invention were, at the time the invention was made, owned by the same person or subject to an obligation of assignment to the same person.

Claims 1-6 and 9-14 are rejected under 35 U.S.C. § 103 as being unpatentable over Dalebout et al. '396, hereinafter referred to as "Dalebout", in view of Day.

In regard to claim 1, Dalebout discloses a treadmill comprising: support structure (12) configured to be free standing and having feet means (57, 91) for positioning on a support

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surface and having an upright structure (42) extending upwardly from said feet means; a tread base having a front, a rear, a left side and a right side and an endless belt (18) positioned between said left side and said right side. Dalebout fails to disclose a tread base connected to said support structure to be moveable between a first position and a second position as claimed. Day teaches a tread base connected to the support structure to be moveable between a first position (Fig. 1) in which said endless belt is positioned for operation by a user positioned thereon and a second position (Fig. 2) in which said rear of said tread base is moved toward said support structure for storage. It would have been obvious to one of ordinary skill in the art to modify the treadmill discloses by Dalebout to use a tread base movable between a first position and a second position for storage in view of the teaching of Day.

As to claim 2, Dalebout discloses an upright structure including a left upright member and a right upright member.

As to claim 3, Day teaches a tread base having a front portion extending from said front to a position about midway between said front and said rear wherein said front portion of said tread base is rotatably attached to said support structure to rotate about a base axis.

As to claim 4, Dalebout discloses a tread base having mass means and a center of gravity and wherein said tread base is

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formed with the mass distributed and configured to position said center of gravity above the base axis, when the tread base is in the second position.

As to claim 5, Dalebout discloses a treadmill base comprising a front roller (22) connected to and between said left side and said right side, wherein said endless belt is trained about said front roller and wherein torque means (32) is connected to said front roller to supply rotational torque thereto, said torque means being positioned between said base axis and said front.

As to claim 6, Dalebout discloses a torque means that is an electric motor.

As to claim 9, Dalebout discloses feet means including a left foot mechanically associated with said left upright member and a right foot mechanically associated with said right upright member, wherein said left foot and said right foot are sized to define a foot print to independently and stably support said tread base in said first position, capable of supporting said tread base in said second position and capable of support said tread base when said tread base is moving thereinbetween.

As to claim 10, Dalebout discloses a left foot that is an elongate member and said right foot is an elongate member spaced from said left foot and in general alignment therewith.

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As to claim 11, Dalebout discloses feet means including a front support member (60) connected to and between said left foot and said right foot and a rear support member (116) connected to and between said left foot and said right foot spaced from said front support member.

As to claim 12, Dalebout discloses a support structure including a cross member (34) extending between and connected to said left upright member and said right upright member.

As to claim 13, Dalebout discloses a left upright member and a right upright member each having upward distal ends wherein said cross member is connected proximate said distal ends.

As to claim 14, Day teaches latching means (32,33) adapted to said tread base and said upright structure, said latching means being operable to attach said tread base in said second position to said upright structure.

Claims 7 and 8 are rejected under 35 U.S.C. § 103 as being unpatentable over Dalebout in view of Day as applied to claims above, and further in view of Wanzer et al.

As to claim 7, Dalebout fails to disclose a torque means that is a flywheel. Wanzer et al. teaches a torque means that includes a flywheel (128) to facilitate the rotation of the motor at a constant speed. It would have been obvious to one of ordinary skill in the art to modify the treadmill disclosed by Dalebout to include a flywheel to facilitate the rotation of the

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motor at a constant speed in view of the teaching of Wanzer et al.

As to claim 8, Dalebout discloses a front roller that rotates about said base axis.

Claims 15-20 rejected under 35 U.S.C. § 103 as being unpatentable over Dalebout in view of Day as applied to claims above, and further in view of Dalebout '776.

As to claim 15, Dalebout discloses a single handle fixedly connected to both upright members positioned for grasping by a user positioned on said endless belt with said tread base in said first position. Dalebout fails to disclose a left rigid handle pivotally connected to the left upright and a right rigid handle pivotally connected to the right upright. Dalebout '776 teaches left and right rigid handles pivotally connected the respective sides of a single upright to provide for upper body exercise. It would have been obvious to one of ordinary skill in the art to modify the treadmill disclosed by Dalebout to include right and left rigid handle pivotally connected to the uprights to provide for upper body exercise in view of the teaching of Dalebout '776. Further, it would have been obvious to one of ordinary skill in the art to attach the left handle to the left upright and the right handle to the right upright as Dalebout has two uprights.

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As to claim 16, as discussed above a left handle attached to the left upright and a right handle attached to the right upright would have been obvious to one of ordinary skill in the art.

As to claim 17, Dalebout '776 teaches handles that each have a first portion (108) that extend toward the rear of the tread base when the tread base is in the first position.

As to claim 18, Dalebout '776 teaches handles that each have a second portion (99) connected to said first portion and extending downwardly toward said feet means.

As to claim 19, Dalebout '776 teaches handles that each have a third portion (112) connected to said second portion that extends toward said upright member.

As to claim 20, Dalebout '776 teaches rotatably attached handles.

Any inquiry concerning this communication should be directed to Lynne A. Reichard at telephone number (703) 308-1159. Additionally, any facsimile transmissions concerning this application should be directed to Lynne A. Reichard at fax number (703) 305-3590.

  
LYNNE A. REICHARD  
PRIMARY EXAMINER  
GROUP 3302

Lynne A. Reichard  
June 27, 1996